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May 10, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 6, 2004

Case No.: TIA-0241

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Physician Panel and the Panel), which determined that the Applicant's illness was not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the Appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a) (2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as an auditor for the Pacific Northwest National Laboratory (the plant) at Hanford. He worked at the plant from 1977 to 1978.

The Applicant filed a Subpart B application and a Subpart D application, claiming bladder cancer. The DOL issued a negative Subpart B determination. The OWA forwarded the Subpart D application to the Physician Panel, which also issued a negative determination for the bladder cancer. The Panel considered the Applicant's smoking history, epidemiologic data, the OWA record, and his occupational exposures. The Panel found that there was no evidence establishing a link between the Applicant's workplace exposures to his bladder cancer. See Physician's Panel Report at 1. The OWA accepted the determination, and the Applicant appealed.

In his two letters of appeal, the Applicant states he was exposed to radionuclides, enriched uranium, plutonium, lead, strontium, iodine and other ionized radiation at the plant. The Applicant asserts that 30 percent of bladder cancers are caused by exposure to ionized radiation such as his exposures at the plant. Also, the Applicant challenges the Panel's discussion of his smoking history as an associated risk factor with his illness. The Applicant states that he ceased smoking 29 years prior to his diagnosis and that studies have proven the latency period for bladder cancer for smokers is 20 years. See Applicant's Appeal Letters.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's arguments do not indicate Panel error. The Panel's task was to determine that it was "at least as likely as not" that hazardous exposures at the site were a significant contributor to the Applicant's bladder cancer. The Applicant's arguments that he was exposed to radiation and that his smoking was not a risk factor are simply disagreements with the Panel's medical opinion.

As the foregoing indicates, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-241, be, and hereby is, denied.

- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 10, 2005